

standard license authority would enable the Combined Company to invest additional resources in these facilities and to integrate them fully into its existing network — improvements which will redound to the benefit of consumers.

Moreover, the Commission should not be concerned that a grant of standard license authority for these stations will somehow reward past noncompliance by certain individuals within MobileMedia. As discussed in Section III, *infra*, these individuals are no longer employed in the MobileMedia organization. The record is clear that Arch, the transferee in this case, is fully qualified to operate these stations and has an excellent service and compliance record. In addition, maintaining MobileMedia's current operations intact will further the principal purpose of the *Second Thursday* doctrine — namely, preserving the value of the business for the protection of MobileMedia's thousands of innocent creditors.⁴⁶

3. Request for Waiver of FCC Application Fees

Pursuant to Section 1.1117 of the Commission's Rules,⁴⁷ MobileMedia hereby requests waiver and refund of the filing fees due in connection with the accompanying twenty-seven applications for consent to transfer of control of the radio station licenses held by MobileMedia and its subsidiaries.⁴⁸ As detailed in Subsection B above, MobileMedia and its

⁴⁶ In the alternative, the Applicants respectfully request that the Commission permit the Combined Company to continue to operate the stations under interim operating authority, but declare that the Combined Company will enjoy protection from any future market area licensee authorized to operate on these frequencies, as well as rights of incumbency. Such a determination is the minimum necessary to ensure the provision of uninterrupted service to subscribers. This alternative, however, would still leave in place significant uncertainties surrounding these facilities that could hamper the Combined Company's ability to fully integrate them into its network.

⁴⁷ 47 C.F.R. § 1.1117.

⁴⁸ See Section VIII. The parties are not seeking a waiver of the fees due in connection with the applications for transfer of control of Arch's licenses. See Section IX.

licensee subsidiaries have filed petitions under Chapter 11 of the U.S. Bankruptcy Code in order to restructure more than \$1.1 billion in debt. The approximately \$97,000 in filing fees for the instant applications represents a substantial expenditure, particularly given the Company's current need to harbor its working capital. This expenditure would have to be borne by innocent creditors whose claims are already being compromised in the bankruptcy proceedings.

Section 1.1117 of the Commission's rules authorizes the Commission to waive fees "where good cause is shown and where waiver or deferral of the fee would promote the public interest."⁴⁹ In general, the Commission "recognizes that the trustee [in bankruptcy] has a specific statutory mission and that strict enforcement of our procedural rules may conflict with the bankruptcy laws."⁵⁰ A receiver, trustee or debtor-in-possession is "charged with the duty of disposing of the assets in a manner that maximize[s] the interests of the creditors."⁵¹ Thus, the Commission, in *Martin W. Hoffman, Trustee*,⁵² found that a waiver of a hearing fee deadline "served the public interest by accommodating the bankruptcy laws and by enabling [the trustee] to carry out his responsibilities as the appointed trustee."⁵³ Further, the Commission has already recognized, in the context of regulatory fees, that "where a bankruptcy trustee, receiver, or debtor in possession is negotiating a possible transfer of a

⁴⁹ 47 C.F.R. § 1.1117(a).

⁵⁰ *Application of Martin W. Hoffman, Trustee*, Memorandum Opinion and Order, 12 FCC Rcd 11722, 11723 (1997).

⁵¹ *LaRose v. FCC*, 494 F.2d at 1149.

⁵² 12 FCC Rcd 11722 (1997).

⁵³ *Id.* at 11723.

license, the regulatory fee could act as an impediment to the negotiations and the transfer of the station to a new licensee.”⁵⁴ Following this reasoning, the Commission has previously granted MobileMedia a waiver of its FY 1997 Regulatory Fees⁵⁵ and has waived the regulatory fees for numerous other companies facing similar circumstances.⁵⁶ The Commission has previously and repeatedly recognized that a waiver of its processing fees for an entity in bankruptcy serves the public interest. The same conclusion is warranted here. By waiving or substantially reducing the filing fees in this case, the Commission can help MobileMedia emerge from bankruptcy, preserve its assets, more fully satisfy its obligations to its creditors, and continue to serve its subscribers.

⁵⁴ *Implementation of Section 9 of the Communications Act*, 10 FCC Rcd 12759, 12762 (1995).

⁵⁵ See Letter to Ronald R. Grawert, CEO, MobileMedia, from Marilyn J. McDermett, Associate Managing Director for Operations, FCC (Sept. 12, 1997).

⁵⁶ See Letter to John S. Neeley, Esq., from Marilyn J. McDermett, Associate Managing Director for Operations, FCC (April 18, 1997) (which granted the request of American Broadcasting Systems, Inc. (“ABS”) for a waiver and refund of the FY 1996 Regulatory Fees based on the fact that ABS was undergoing a Chapter 11 reorganization and was named a debtor-in-possession by the United States Bankruptcy Court); Letters to Brian M. Madden, Esq., from Marilyn J. McDermett, Associate Managing Director for Operations, FCC (April 17, 1996 and Oct. 25, 1996) (which granted the requests of Allan B. Mendelsohn, appointed trustee of the estate of the licensee of Radio Station WUSS by the United States Bankruptcy Court for waivers of the FY 1995 and FY 1996 Regulatory Fees for Radio Station WUSS); Letters to Jack Lotsof, President of Stereo 97, Inc., from Marilyn J. McDermett, Associate Managing Director for Operations, FCC (Feb. 23, 1996 and March 27, 1997) (which granted requests for waivers of the FY 1994, FY 1995 and FY 1996 Regulatory Fees for FM Station KAVV-FM based on the licensee’s existing state of undue financial hardship); Letter to R. Edward Price, Esq., from Marilyn J. McDermett, Associate Managing Director for Operations, FCC (Nov. 14, 1996) (which granted request to defer payment and waive the FY 1996 Regulatory Fees for Stations KVVQ (AM) and KVVQ-FM based on the fact that the stations were currently in receivership).

4. Additional Authorizations

While the applications for approval of the transfer of ultimate control of these authorizations are intended to be complete, the licensees involved in this proposed transaction may have on file, and may file for, additional authorizations for new or modified facilities which may be granted during the pendency of the transfer of control applications.

Accordingly, the Applicants request that the grant of the transfer of control applications include authority for the Combined Company to acquire control of:

- (1) any authorization issued to Arch or MobileMedia or their subsidiaries during the pendency of the Commission's consideration of the transfer of control applications or during the period required for consummation of the transfer following approval;
- (2) construction permits held by such licensees that mature into licenses after closing and that may have been omitted from the transfer of control applications; and
- (3) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer.

Such action would be consistent with prior decisions of the Commission.⁵⁷

5. Blanket Exemptions to Cut-Off Rules

Pursuant to Sections 22.123(a), 24.423(c), 25.116(b)(3), 90.131(a) and 101.29(c)(4) of the Commission's Rules, the Applicants request a blanket exemption from any applicable cut-off rules in cases where MobileMedia, Arch or their subsidiaries file amendments to pending Part 22, Part 24, Part 25, Part 90, or Part 101 or other applications to reflect the consummation of the proposed transfer of control. The exemption is requested so that

⁵⁷ See *Applications of PacifiCorp Holdings, Inc. and Century Telephone Enterprises, Inc.*, 13 FCC Rcd 8891, 8915-16 (1997); *Applications of Pacific Telesis Group and SBC Communications, Inc.*, 12 FCC Rcd 2624, 2665 (1997); *Applications of Craig O. McCaw and American Telephone and Telegraph Co.*, 9 FCC Rcd 5836, 5909 n.300 (1994).

amendments to pending applications reporting the change in ownership would not be treated as major amendments requiring a second public notice period. The overarching scope of the transaction between Arch and MobileMedia demonstrates that any ownership changes that result with respect to any particular pending application are part of a larger merger undertaken for a legitimate business purpose. Grant of an exemption from the cut-off rules would be consistent with previous Commission decisions routinely granting a blanket exemption in cases involving large transactions.⁵⁸

G. Related Government Filings

1. State Approvals to the Transfer

MobileMedia and Arch will seek the requisite transfer approvals from and/or file the requisite transfer notifications with the necessary state authorities.

2. Hart-Scott-Rodino Review

Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,⁵⁹ HSR filings have been made with the U.S. Department of Justice and the Federal Trade Commission.

3. Bankruptcy Court Approval

Before MobileMedia can solicit the votes of its creditors on the Amended Plan, the Bankruptcy Court must approve the Disclosure Statement that is intended to provide MobileMedia's creditors with adequate information with respect to the Amended Plan. A hearing on the Disclosure Statement is currently scheduled for September 24, 1998. As

⁵⁸ See, e.g., *Applications of PacificCorp Holdings, Inc. and Century Telephone Enterprises, Inc.*, 13 FCC Rcd at 8915; *Applications of Craig O. McCaw and American Telephone and Telegraph Co.*, 9 FCC Rcd at 5909 n.300 (1994); *Applications of Centel Corporation and Sprint Corporation*, 8 FCC Rcd 1829, 1833 (1993).

⁵⁹ 15 U.S.C. § 18 (1994).

disclosed previously to the Commission in the initial Stay Motion,⁶⁰ solicitation of votes on the Amended Plan will take approximately 60-75 days. If the requisite votes are obtained, a hearing will thereafter be held before the Bankruptcy Court at which the Company will seek to have the Amended Plan confirmed.

III. THE COMMISSION SHOULD TERMINATE THE MOBILEMEDIA HEARING AND PERMIT THE PROPOSED TRANSACTION UNDER THE *SECOND THURSDAY* DOCTRINE

The Commission's *Second Thursday*⁶¹ doctrine stands as an exception to the general rule that a licensee may not transfer facilities involved in a hearing concerning its character qualifications unless it is found qualified to remain a licensee.⁶² Under the doctrine, a licensee in bankruptcy may avoid an FCC hearing on qualifications issues and effect a transfer of its licenses to a qualified third party as long as the individuals charged with misconduct (1) would have no part in the proposed operations and (2) would derive no benefit from such transfer, or would receive only a minor benefit that would be outweighed by equitable considerations in

⁶⁰ Emergency Motion for Special Relief and Stay of Proceedings Regarding MobileMedia Corporation (filed April 23, 1997) at 7.

⁶¹ *Second Thursday Corp.*, 22 F.C.C.2d 515 (1970), *recon. granted in part*, 25 F.C.C.2d 112 (1970). In *Second Thursday*, the Commission considered whether the licensee corporation's four stockholders, who were allegedly guilty of misrepresentations to the Commission, would benefit from the sale of corporate assets to a qualified assignee. Initially, the Commission denied the proposed assignment based upon its determination that a large portion of the purchase price would accrue to the benefit of the four shareholders. The trustees subsequently filed a petition for reconsideration that included concessions by the four shareholders waiving all claims as creditors of the corporation and rights to any of the proceeds from the sale of the corporate assets. In light of this new evidence, the Commission determined that the benefits to the public interest far outweighed any *de minimis* benefit the current stockholders would receive as a result of the sale of the broadcast stations, and therefore, granted the pending transfer applications without hearing.

⁶² *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

favor of innocent creditors.⁶³ This policy is specifically designed (at the direction of the U.S. Court of Appeals) to “accommodate[] the policies of federal bankruptcy law with those of the Communications Act.”⁶⁴ The Commission achieves this accommodation in assessing whether to grant a *Second Thursday* petition by balancing the potential that alleged wrongdoers may benefit from the sale or transfer against the public interest inherent in the recovery by innocent creditors of proceeds from the sale.⁶⁵

While *Second Thursday* has typically been applied to small, privately held companies, the Commission specifically determined in this case that MobileMedia (and other widely held companies) also are eligible for *Second Thursday* relief. In its *Stay Order*, the Commission emphasized that

the public interest considerations underlying *Second Thursday* apply to publicly traded corporations as well as to privately held companies. In both cases, there is the same need to balance the possible injury to the Commission’s possible regulatory authority that might flow from a wrongdoer’s realization of benefits against the public interest in innocent creditors’ recovery from the sale and assignment of the license to a qualified party.⁶⁶

Indeed, the Commission specifically granted a stay of the hearing proceeding in order to permit MobileMedia to avail itself of this relief.

As part of its *Second Thursday* Petition, MobileMedia must show: (1) that no potential wrongdoers (as defined in the *Stay Order*) will “receive compensation for their equity

⁶³ *Second Thursday Corp.*, 22 F.C.C. 2d at 516.

⁶⁴ *LaRose v. FCC*, 494 F.2d at 1147 n.2.

⁶⁵ *Mid-State Broadcasting Co.*, 61 F.C.C.2d 196, 197 (1976). As mentioned previously, the fact that MobileMedia’s innocent creditors support approval of the Merger weighs heavily in favor of a finding that this transaction serves the public interest.

⁶⁶ *Stay Order* at 7931.

interests”⁶⁷ or otherwise “derive . . . benefits from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors”;⁶⁸ (2) that no “potential wrongdoer” will “have [a] role in the future operation and management of the company”;⁶⁹ and (3) that no current officer, director or “senior manager” has “benefitted from sale of their stock in the interim” between the Commission’s stay of the hearing and the filing of the *Second Thursday* Petition.⁷⁰

With specific regard to this case, the Commission has determined that “the allegations against MobileMedia are sufficient to raise questions only as to the qualifications of four individuals.”⁷¹ As previously identified by the Commission, these are:

- Gene P. Belardi, former Secretary and Regulatory Counsel;
- Kenneth R. McVay, former Secretary, Vice President, and General Counsel;
- John M. Kealey, former Director, President, and Chief Operating Officer; and
- Gregory M. Rorke, former Director and Chief Executive Officer.

The Commission viewed Mr. Belardi and Mr. McVay as the individuals “primarily responsible for carrying out the deception of the Commission,” and noted that they were “fired

⁶⁷ *Id.* at 7933.

⁶⁸ *Second Thursday Corp.*, 22 F.C.C.2d at 516.

⁶⁹ *Stay Order* at 7933.

⁷⁰ *Id.*

⁷¹ *MobileMedia Corp.*, 12 FCC Rcd 11861, 11863 (1997). All other current and former officers, directors and senior managers of MobileMedia have been found free from any substantial and material question concerning their qualifications to be a licensee. *Id.* at 11863-64. Accordingly, any demonstration concerning future involvement with the merged company or benefits resulting from the transaction is by definition limited to these four individuals. *See MobileMedia Corporation, et al.*, 13 FCC Rcd 10634, 10637 (1998) (“In the absence of evidence that [certain individuals] participated in or approved of misconduct, there is no justification for treating them as ‘individuals charged with misconduct’ for purposes of the *Second Thursday* doctrine.”).

by MobileMedia because of their involvement.”⁷² The Commission indicated that Mr. Kealey and Mr. Rorke were identified by Mr. Belardi and Mr. McVay as having “approv[ed] the deceptive filings,” which allegations they deny.⁷³

As detailed below, the alleged wrongdoers will have no part in the proposed operations post-transaction; will derive no benefit from the transfer or only a minor benefit that is clearly outweighed by equitable considerations in favor of innocent creditors; and have not and will not profit from the sale of stock during the pendency of the Commission’s stay. Accordingly, as shown herein, the proposed transaction fully satisfies the requirements of the *Second Thursday* doctrine, and the Commission should, therefore, dismiss the hearing against the Company.

A. Role in Future Operations or Management

With respect to the first prong of the *Second Thursday* test, none of the four alleged wrongdoers identified by the Commission will have any part in the proposed operations of the Combined Company after consummation of the Merger. As has previously been reported to the Commission and affirmed in the attached declaration of Joseph A. Bondi, Chairman - Restructuring, of MobileMedia,⁷⁴ none of these individuals is currently employed by MobileMedia or its subsidiaries. Mr. Belardi and Mr. McVay were terminated by MobileMedia in September 1996, soon after the misrepresentations to the FCC were discovered. By that date, Mr. Kealey and Mr. Rorke had already departed from the

⁷² *MobileMedia Corp.*, 12 FCC Rcd at 11863-64.

⁷³ *Id.* at 11864. For convenience, these four individuals will be referred to herein collectively as the “alleged wrongdoers.”

⁷⁴ See Section VII.G.

Company. Similarly, as certified in the attached declaration of Paul H. Kuzia,⁷⁵ Executive Vice President, Technology and Regulatory Affairs of Arch, none of these individuals currently serves in any capacity within Arch or its subsidiaries. Most significantly, however, as evidenced by the same declaration, none of the alleged wrongdoers will have any role in the proposed operation of the Combined Company after the transaction.⁷⁶

B. Benefits Derived From the Transaction

With respect to the second prong of the test, none of the alleged wrongdoers will derive any cognizable benefit from the proposed transfer. First, while MobileMedia's corporate records reflect that two of these four individuals are shareholders of MobileMedia and/or hold options, rights or warrants to acquire MobileMedia shares,⁷⁷ none of the four will receive any consideration whatsoever from the transaction as a result of any equity holdings. Indeed, as specifically provided for in the Amended Plan, all equity interests in MobileMedia are being canceled and no distribution will be made with respect thereto. The Merger Agreement likewise provides that all shares, options, warrants, or

other right issued by any of the Debtors to acquire any such capital stock and outstanding immediately prior to the Effective Time *shall be canceled without payment of any consideration therefor* and shall cease to exist.⁷⁸

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ As indicated in Section VII.G., only Mr. Kealey (with 3,264 shares) appears as a current shareholder of MobileMedia. He acquired those shares before June 30, 1995, in the open market for \$18.50 a share. The company's records also reflect that Mr. Belardi was granted options for 75,000 shares which were never exercised and expired with his termination from the company on September 27, 1996. Likewise, Mr. McVay was granted options for 87,890 shares which were never exercised and expired with his termination from the company on September 27, 1996. Mr. Kealey has outstanding options for 166,281 shares, and Mr. Rorke has outstanding options for 140,000 shares.

⁷⁸ Merger Agreement, § 1.5(b) (emphasis added). A copy of the Merger Agreement is
(Continued...)

Accordingly, consistent with the Commission's *Second Thursday* precedent, no direct benefits will accrue to the alleged wrongdoers by virtue of their ownership of MobileMedia stock.

Moreover, the alleged wrongdoers are unlikely to benefit as creditors of MobileMedia. While Messrs. Belardi and Kealey have submitted pre-petition proofs of claim in the bankruptcy case for amounts they assert are due them under their employment contracts, MobileMedia intends to dispute these claims vigorously in the Bankruptcy Court. Moreover, even if some portion of these two claims is allowed, any consideration the two suspected wrongdoers receive will be on account of their pre-existing contractual rights, not the proposed transaction. However, even if the Commission were to find that the wrongdoers' claims for benefits under their existing employment contracts arose as a result of the proposed transaction, these benefits would be at most exceedingly minor and would be far outweighed by the recovery afforded under the Amended Plan to innocent creditors.⁷⁹

(...Continued)

attached at Section VII.A. The Merger Agreement essentially confirms the Commission's belief in issuing the *Stay Order* that:

[i]t appears that any stock currently in the hands of suspected wrongdoers has irretrievably lost all substantial value. We take official notice that MobileMedia's stock, which traded for as much as \$27 a share in late 1995, has not traded for as much as \$2 a share since even before MobileMedia disclosed its wrongdoing in October 1996. As of the close of June 3, the stock was listed at 50 cents a share, and it has now been delisted from the Nasdaq National Market, on which it was traded publicly. . . . [i]t seems unlikely that granting a stay or *Second Thursday* relief will result in any trading that could substantially benefit suspected wrongdoers.

Stay Order at 7932.

⁷⁹ In any event, even if one of the alleged wrongdoers could derive some direct or indirect benefit from the sale, the benefit would be extremely minor. As underscored in *NewSouth Broadcasting*, 10 FCC Rcd 4424, 4425 (1995) the *Second Thursday* doctrine is still applicable in such instances. In that case, the Commission determined that the direct benefit of

(Continued...)

Finally, none of the alleged wrongdoers will receive any other type of benefit, as delineated in *Second Thursday* precedent, as a result of the transaction. As evidenced by the declarations of Mr. Bondi and Mr. Kuzia, the alleged wrongdoers are currently not entitled to receive any other type of benefits from either MobileMedia or Arch; nor will they receive any such benefits at closing or thereafter.⁸⁰

C. Interim Sale of Stock

Finally, as far as MobileMedia's records reflect, the suspected wrongdoers have not benefited from the sale of stock during the pendency of the Commission's stay – a possibility in any event that is extremely remote.⁸¹ As indicated in the attached declaration provided by Harris Trust and Savings Bank, which is the Company's common stock transfer agent, the

(...Continued)

\$36,000 to the bankruptcy estate of the wrongdoer out of a total purchase price of \$1,900,000 was *de minimis* in light of the compensation the innocent creditors would receive from the sale of the station. *Id.* at 4425-26. Similarly, in *Shell Broadcasting*, the Commission approved the application for assignment of license even though the suspected wrongdoer would receive an indirect benefit from the sale amounting to 8% of the total sales price. *Shell Broadcasting Inc.*, 38 F.C.C.2d 929, 933. The indirect benefit was minor in comparison to the substantial recovery the creditors would receive from the sale.

⁸⁰ See Section VII.G. The contracts with Messrs. Belardi and Kealey obligated MobileMedia to maintain health insurance, life and disability insurance and nationwide paging service for them until December 31, 1998. However, by reason of the Company's bankruptcy filing on January 30, 1997, the Company discontinued premium payments and other benefits. Accordingly, these individuals are not currently receiving, nor will they receive, these benefits which are, in part, the subject of their proofs of claim.

⁸¹ As the Commission recognized in the *Stay Order*, MobileMedia's stock has "lost all substantial value" and traded at 50 cents a share before it was delisted from the Nasdaq exchange. *Stay Order* at ¶ 16. Based on these facts, the Commission concluded that it was unlikely that a substantial benefit to suspected wrongdoers accruing from stock ownership was unlikely. *Id.*

stock holdings of the alleged wrongdoers have not changed during the pendency of the FCC stay.⁸²

Moreover, in an effort to ensure compliance with the Commission's mandate on possible interim benefit, MobileMedia sought, and on July 11, 1997 was granted, an injunction that prohibited the sale or transfer of MobileMedia stock by the then-current officers and directors considered to be potential wrongdoers by the Commission. All 19 enjoined parties were subsequently removed from the Commission's list of suspected wrongdoers.⁸³

In light of these facts, MobileMedia submits that it has fully met the requirements of the Commission's *Second Thursday* policy and the Commission's *Stay Order*. The alleged wrongdoers will receive no cognizable benefit from this transaction, and the available records reveal that they have not benefited from the sale of stock during the pendency of the stay. Likewise, they will not be associated in any way with the Combined Company. Accordingly, MobileMedia requests that the Commission terminate the hearing designated against the Company and approve this transaction. Doing so clearly will serve to protect innocent creditors who are owed hundreds of millions of dollars, as evidenced by support of these same creditors for the Merger, and, thus, accommodate the Communications Act with "the policies of federal bankruptcy law."⁸⁴

⁸² See Section VII.G. MobileMedia does not maintain records of stock purchases or sales by former officers and directors. The Company's role is limited to assisting current officers and directors in filing SEC forms 3-4-5.

⁸³ *MobileMedia Corp.*, 12 FCC Rcd 11861, 11863 (1997).

⁸⁴ *LaRose v. FCC*, 494 F.2d at 1146.

IV. THE MERGER OF ARCH AND MOBILEMEDIA CLEARLY ADVANCES THE PUBLIC INTEREST AND SHOULD BE EXPEDITIOUSLY APPROVED

A. Overview of the FCC's Public Interest Analysis

In accordance with its obligations under Section 310(d) of the Communications Act, the Commission must determine whether grant of the proposed transfer of control will serve the public interest, convenience and necessity.⁸⁵ Beginning with its review of the merger of Bell Atlantic and NYNEX, the Commission has articulated a multi-step inquiry for its public interest analysis of proposed mergers or acquisitions of telecommunications carriers.⁸⁶ In addition to considering the "merger-specific" efficiencies such as cost reductions, productivity enhancements, improved incentives for innovation, and the advancement of FCC policy goals, this analysis also includes a framework for assessing the competitive impact of the merger on the relevant telecommunications market.

Under this competitive analysis, the Commission first defines the relevant product and geographic markets. Second, the Commission identifies significant current and potential participants in each relevant market, especially those likely to play a significant competitive role. Third, the Commission evaluates the horizontal effects that the proposal may have on competition in the relevant markets. Ultimately, the Commission will weigh any competing harmful and beneficial effects to determine whether, on balance, the proposal is likely to enhance competition in the markets in question or otherwise serve the public interest.

⁸⁵ 47 U.S.C. § 310(d).

⁸⁶ See *Applications of NYNEX Corporation and Bell Atlantic Corporation*, 12 FCC Rcd 19985, 20008-14 (1997) (hereinafter "*Bell Atlantic/NYNEX Order*"); see also *Application of Motorola, Inc. and American Mobile Satellite Corporation for Consent to Transfer Control of Ardis Company*, 13 FCC Rcd 5182, 5189-92 (1998); *Applications of PacifiCorp Holdings, Inc. and Century Telephone Enterprises, Inc.* at 8898-8902.

The parties to the instant transaction submit that an extensive *Bell Atlantic/NYNEX* analysis is unnecessary here because it can be easily determined that the proposed merger does not raise competitive concerns. Neither company has market power; the Commission has repeatedly recognized that the messaging market is highly competitive; and the proposed transaction will create no risk of anti-competitive unilateral or coordinated conduct. Nevertheless, to facilitate and expedite the Commission's consideration of the applications, the parties are providing an analysis of the proposed transaction under the *Bell Atlantic/NYNEX* framework. Section IV.B. below reviews the tangible and substantial public interest benefits that will flow from the Merger. Section IV.C. then explains why the transaction will have no adverse competitive impact. Given the significant public benefits and the absence of competitive concerns, the Commission should expeditiously grant the instant transfer applications.

B. The Proposed Transaction Will Directly and Significantly Benefit the Public and Advance Important FCC Policies

The merger of MobileMedia and Arch will promote the public interest through both the advancement of longstanding FCC policies as well as the creation of merger-specific efficiencies that will enhance service to consumers. In addition to protecting the interests of innocent creditors and thereby advancing the policies underlying the *Second Thursday* doctrine, the proposed transaction will ensure the provision of uninterrupted messaging service to millions of subscribers. It will also create a number of synergies and savings within the new company that will ultimately benefit consumers.

As an initial matter, the proposed transaction will clearly accomplish the specific public interest goals underlying the Commission's *Second Thursday* policy. As described above, the *Second Thursday* doctrine is intended to "accommodate[] the policies of federal bankruptcy

law with those of the Communications Act.”⁸⁷ The doctrine specifically recognizes “the public interest in innocent creditors’ recovery from the sale and assignment [or transfer] of a license to a qualified party.”⁸⁸ In this case, grant of these applications would help preserve the economic value of more than \$1.1 billion owed to the innocent creditors. So far as MobileMedia can determine, this case represents by far the largest amount of debt available for protection for innocent creditors in a *Second Thursday* transaction. Indeed, MobileMedia has literally thousands of creditors⁸⁹ that, as a group, would suffer an enormous loss if the requested relief were not granted and MobileMedia were not permitted to transfer control of its licenses to Arch. If the transaction is approved, however, MobileMedia’s secured creditors would be paid the principal amount of their claims -- \$649 million -- in full, and its unsecured creditors (whose claims exceed \$460 million) would collectively receive a majority equity position in the Combined Company. The transaction would also preserve the claims of many other trade creditors.

Consumers too would directly benefit from the termination of the hearing and approval of the proposed license transfer. MobileMedia has over 3.2 million customers who rely upon it for paging services – services that often provide vital communications links with employers, healthcare providers, clients, family and friends. If the hearing is not terminated as requested and the transfer to Arch is not effectuated, interruption or termination of these subscribers’

⁸⁷ *LaRose v. FCC*, 494 F.2d at 1146.

⁸⁸ *Stay Order* at 7931.

⁸⁹ These creditors include banks, investment firms, pension funds, companies, individual bondholders and several thousand individuals — including employees — who have provided goods or services to MobileMedia.

services could result. At a minimum, they may suffer the expense and inconvenience of having to change their paging service.

Further, the proposed transaction would result in the formation of a more effective national messaging provider to compete against the several large companies providing such services on a nationwide scale. By combining MobileMedia's strong presence in large markets with Arch's strength in small and medium-sized markets, the Merger will enable the combined company to serve the needs of customers throughout the country. In addition, adding MobileMedia's narrowband PCS licenses should allow Arch to accelerate the deployment of a nationwide narrowband PCS network and expedite the introduction of new paging products and services.

The transaction will also enable both companies to enhance their current financial condition – Arch will be able to reduce its overall leverage ratio, while MobileMedia can complete its Chapter 11 reorganization. As a result, the Combined Company should be better able to access additional sources of capital.⁹⁰ The combined entity will thus be a stronger competitor financially and better able to deliver innovative and high quality services to consumers at competitive prices.

In addition, certain merger-specific efficiencies will result from combining the operations and technical expertise of the Applicants. Arch will work to identify redundant managerial and administrative functions that Arch's management believes can be eliminated without material impact on customers. Indeed, it is expected that the Combined Company will be able to capitalize on potential synergies in marketing, distribution and operations resulting

⁹⁰ Indeed, the announcement of the Merger has prompted Moody's Investor Services to place Arch's debt ratings under review for possible upgrade. *See Capital Markets Report*,
(Continued...)

in expected annualized savings of \$25 million. These efficiencies should produce substantial consumer benefits. Arch management expects to be able to further reduce the Combined Company's operating costs, which should permit the Combined Company to further reduce per unit operating costs. Given the high fixed infrastructure costs in the paging industry, the larger scale of the Combined Company should permit it to realize increased operating efficiencies by wielding enhanced purchasing power and improved sales distribution. Arch's acquisition of MobileMedia's two nationwide narrowband PCS licenses would also permit more efficient build-out through cost sharing over the combined operations, thus enhancing competition in the nationwide market. These efficiencies can be achieved only if the proposed Merger is approved.

C. The Transfer Will Not Produce Any Adverse Competitive Impacts

As discussed below, under the *Bell Atlantic/NYNEX* analytical framework, the merger of Arch and MobileMedia will not raise any risks to competition in the relevant paging/messaging product market. As the Commission recently underscored in its *Third CMRS Competition Report*, the paging/messaging market is "highly competitive."⁹¹ The merger of two companies that lack market power, whose combined national market share would still be significantly less than the largest paging provider, and that face stiff competition from numerous facilities-based carriers, resellers and new entrants will not adversely affect the competitive nature of the paging/messaging market. Accordingly, the Commission can readily

(...Continued)

Dow Jones & Company, August 25, 1998.

⁹¹ See *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Third Report, at 51 n. 260 (rel. June 11, 1998) (hereinafter "*Third CMRS Competition Report*").

and confidently conclude that the transfer will not raise competitive concerns inconsistent with the public interest.

Definition of Relevant Product Market. To identify the relevant product market, the Commission focuses on the products or services offered by the parties and evaluates the extent to which services offered by other communications companies compete for the business conducted by those entities.⁹² A product market is typically defined as a “service or group of services for which there are no close demand substitutes.”⁹³ In this case, the Commission has defined the relevant product market for companies such as MobileMedia and Arch as the “messaging industry,” which includes paging carriers that provide traditional one-way wireless radio transmission as well as carriers that provide two-way messaging, voice messaging and data transmission.⁹⁴

Definition of Relevant Geographic Market. The relevant geographic market is defined as the geographic area in which all customers will likely face the same competitive alternatives for a product or service.⁹⁵ The messaging industry is a classic local or regional business. Although in recent years interest in paging on a national basis has grown, measured by supply or demand, the business remains a predominantly local or regional one. As a result, the relevant geographic market is local or regional, principally significant individual metropolitan areas throughout the country.

⁹² *Pittencrieff Communications, Inc.*, 13 FCC Rcd 8935 (1997).

⁹³ *Bell Atlantic/NYNEX Order* at 20014.

⁹⁴ *Third CMRS Competition Report* at 41.

⁹⁵ *Bell Atlantic/NYNEX Order*, at ¶ 54.

Identification of Market Participants. The numbers of paging and messaging providers alone offer proof that the merged company will operate in a highly competitive environment. Despite the trend toward consolidation, the Commission's own analysis shows that "The 25 largest cities in the U.S. have an average of 29 paging licenses not including resellers, while the 25 smallest MSAs have an average of 12 paging licenses per area."⁹⁶ The number of licensees in the 25 largest cities increases to 33 when private carrier paging licenses are taken into account.⁹⁷ The proliferation of market participants is equally clear in the increasing number of paging resellers and the availability of service from "such diverse retail outlets as shopping mall kiosks to 7-Eleven and Eckerd Drugs."⁹⁸

Moreover, the numerous participants in the paging and messaging market vary greatly in size and marketing approach, resulting in competition at all levels. Many market participants operate at the national level -- including PageMart, Metrocall, SkyTel, AirTouch and Paging Network, Inc. Collectively, these messaging providers serve nearly 20 million consumers. The Commission was speaking of this segment of the market when it noted in its *Third CMRS Competition Report* that, "[m]any companies actively compete [] with each other in every geographic market."⁹⁹ The Applicants also face numerous additional competitors at the local and regional levels. There are currently more than 600 paging companies in the United States offering competitive alternatives to MobileMedia and Arch. Some of the larger

⁹⁶ *Third CMRS Competition Report* at 41.

⁹⁷ *Id.*

⁹⁸ *Id.* at 41.

⁹⁹ *Id.* at 51.

facilities-based paging licensees and their approximate subscriber base are detailed in the table below:

**Number of Paging Units Held by Company
as of August 3, 1998¹⁰⁰**

Company	Units
PageNet	10,600,000
Metrocall*	4,250,000
Arch	4,000,000
MobileMedia†	3,300,000
AirTouch	3,200,000
PageMart	2,640,000
TSR Wireless	2,200,000
Ameritech	1,600,000
AT&T	1,300,000
SkyTel	1,250,000
Preferred Networks	501,500
Source One Wireless	450,000
TeleTouch	321,000
Network Services	305,000
Bell Atlantic Paging	240,000
* Metrocall's numbers do not reflect its acquisition of paging assets held by the Advanced Messaging Division of AT&T Wireless Services Inc., which would increase Metrocall's paging units to 5,300,000.	
† As of June 30, 1998, MobileMedia had 3.2 million units in service.	

Rounding out the competitive landscape, a multitude of resellers offer paging and messaging services.¹⁰¹

Potential Competitive Impact. The Commission has already found the paging/messaging industry to be one of the most fiercely competitive telecommunications

¹⁰⁰ All data taken from "Top 20 Paging Carriers," *RCR*, vol. 17, no. 31 (Aug. 3, 1998) at 14.

¹⁰¹ Indeed, as noted in the *Third CMRS Competition Report*, "[r]esale accounted for thirty-seven percent of the paging units in service in 1996, up from ten percent in 1991." *Third CMRS Competition Report* at 47 n. 236.

services markets, and the Merger will not negatively effect this condition. As the Commission noted in its *Third CMRS Competition Report*, despite the fact that concentration in the messaging services market has increased during the past few years, the paging/messaging industry remains "highly competitive."¹⁰² Indeed, the messaging marketplace -- whether viewed on a national or local level -- is characterized by vigorous competition. As noted above, both MobileMedia, which currently operates paging services in all of the top 25 MSAs, and Arch, whose operations focus on the country's small-to medium-sized markets, have numerous direct competitors at all levels -- from national level operations to local service providers and from facilities-based competitors to resellers.

Moreover, actual and potential competitive entrants are a significant competitive force both at the nationwide and local level. Aggressive entry into the messaging market by cellular, PCS, and SMR providers has led to a quantum leap in competitive alternatives for consumers in these markets. Many of these large providers have begun to offer paging service as a free bonus to their broadband subscribers. Moreover, regulatory and market conditions in the paging/messaging industry are such that the competitive pressure imposed by potential entrants remains high. The costs of providing service are relatively low -- nearly any wireless operator can use its existing facilities to transmit paging service. Further, regulatory barriers do not serve to preclude entry. In fact, as noted by the Wireless Telecommunications Bureau, recent changes in the regulatory environment facing potential mobile communications carriers further "enhance[] prospects for entry into wireless communications generally."¹⁰³

¹⁰² *Id.*

¹⁰³ *Pittencrieff Communications, Inc.*, at 8957.

Implementation of new wide-area licensing policies and the award of new spectrum for wireless services will only enhance the opportunities for additional market participants.

As the Commission has noted, the effects of this existing competitive climate in the paging/messaging industry have been most evident where consumers are most likely to notice -- namely, in the monthly bills they receive from providers. Thus, as the Commission has recognized, the average monthly price of numeric paging with a customer-owned pager has fallen by almost 23 percent during the last five years and average monthly charges for rental pagers have dropped by some 35 percent.¹⁰⁴ The proposed merger will not adversely affect this trend.

Given the presence of numerous competitors and the unconcentrated nature of the paging/messaging market, it is also clear that the proposed transfer of control would not result in any sort of "unilateral or coordinated effects that enhance or maintain the market power of the . . . parties."¹⁰⁵ First, with respect to unilateral effects, there is no evidence that MobileMedia or Arch would be viewed as an important second choice for the other's customers in any market. The markets serviced by Arch and MobileMedia are complementary. Arch operates in small- to medium-sized markets while MobileMedia primarily serves subscribers in the nation's top 25 MSAs. In the recent *Ardis* decision, the Commission reasoned that the combination of entities with complementary abilities tends not to increase the risk of unilateral anticompetitive behavior.¹⁰⁶ Moreover given the broad range

¹⁰⁴ *Third CMRS Competition Report* at 52.

¹⁰⁵ *Bell Atlantic/NYNEX Order* at 20009.

¹⁰⁶ *Motorola, Inc. and American Mobile Satellite Corporation*, CWD No. 98-3, DA 98-514, ¶ 61 (Wireless Tel. Bur., rel. March 3, 1998) ("*Ardis*") ("[T]he differentiated nature of the services currently offered by AMSC and Ardis (given their distinct coverage capabilities)

(Continued...)

of other large paging providers (including PageNet, the largest), small local entities, resellers, or other types of CMRS providers from which consumers can choose, viewing one company as the automatic substitute for the other is simply untenable. Second, there is no basis for concluding that the Merger will increase the ability of the most significant market participants to engage in coordinated interaction. After the Merger, PageNet, MetroCall, PageMart, SkyTel, AirTouch or any other messaging competitor would be no more likely to coordinate with the Combined Company than they are with either MobileMedia or Arch today. Finally, the Merger will also clearly have no effect on the dynamic performance of the relevant market. After the Merger, the messaging market will still remain highly competitive, characterized by numerous participants and an absence of entry barriers.

Finally, the Merger will not adversely affect competition in the messaging and paging markets when viewed from the perspective of channel utilization and spectrum capacity. The Commission's rules currently allocate as many as 185 exclusive channels in each geographic market that can be used for messaging and paging services, including: 120 common carrier licenses, 48 private carrier licenses and 17 narrowband PCS licenses. As the Commission's *Third CMRS Competition Order* noted, these licenses are broadly distributed such that, when both providers of common carrier and private carrier paging are considered (*not* NPCS), the nation's 25 largest cities are served, on average, by 33 different licensees, with an average of 12 licensees in the 25 smallest MSAs.¹⁰⁷ Moreover, a significant amount of new spectrum available

(...Continued)
will tend to limit the opportunity for AMSC to profitably elevate prices unilaterally.”)

¹⁰⁷ *Third CMRS Competition Report* at 41, n.207.

for use by messaging and paging service providers will be introduced in the near future.¹⁰⁸ Given the available spectrum capacity and the broad distribution of licenses, it is evident that the Combined Company will not control sufficient spectrum in any market to raise competitive concerns.¹⁰⁹

In summary, the relevant markets at issue in this transaction are well recognized to be brimming with vigorous competition. Grant of the transfer applications would not present an opportunity for the significant concentration of spectrum; nor would it have any spectrum cap implications.¹¹⁰ Accordingly, the Commission should act expeditiously to grant the instant applications.

V. REQUEST FOR EXPEDITIOUS APPROVAL

The Applicants also request that the Commission consider these applications as expeditiously as possible consistent with the requirements of the Communications Act. As the Commission is aware, MobileMedia's Amended Plan, which is reflected in these applications, also requires the approval of the United States Bankruptcy Court for the District of Delaware. The Bankruptcy Court has scheduled a hearing on the Disclosure Statement on September 24,

¹⁰⁸ The Commission will soon auction 17 additional narrowband PCS licenses. Thereafter, at some future date, the Commission will also auction an additional 1 MHz of NPCPS spectrum which is currently being held in reserve, an amount equal to one-third of the total spectrum allocated for NPCPS.

¹⁰⁹ Competitive concerns related to channel utilization and spectrum capacity issues are further minimized when spectrum allocated for other services (*e.g.*, PCS and cellular), which can and is being used for the provision of paging services is taken into account

¹¹⁰ The FCC's spectrum cap, codified at 47 C.F.R. § 20.6(a), is inapplicable here as it does not apply to paging or narrowband PCS spectrum. While the multiple ownership restriction on Narrowband PCS spectrum, codified at 47 C.F.R. § 24.101, is implicated by the proposed transaction, the parties have requested a temporary, limited waiver of this provision. *See, infra*, Section II.F.1.